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Women's Employment Rights in China: Creating Harmony for Women in the Workforce

JAMIE BURNETT*

ABSTRACT

This Note explores the global problem of gender-based labor inequality as exemplified in China. China's historic and cultural framework, the efforts the Chinese government has made to coordinate with the global community on women's rights initiatives, and recent legislation passed at both national and local levels in China provide an interesting case study for countries facing gender inequality in the workplace. The items of legislation, though sometimes drafted using international treaties as a framework, contain unique provisions that provide protections for Chinese women that are not seen elsewhere in the world. Additionally, the Chinese government's current political goal of achieving a harmonious society signals potentially forthcoming advancements in workplace gender equality.

INTRODUCTION

For over sixty years, Chinese women have enjoyed legal equality. Article 91 of the 1954 Constitution of the People's Republic of China (China or PRC) specifically gave women "equal rights with men in all areas of political, economical, cultural, social, and domestic life." This status was reinforced in the 1982 Constitution¹ and has been emphasized by numerous laws and regulations protecting women's

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1. See XIAN FA arts. 33, 48 (1982) (P.R.C.) (declaring all citizens "equal before the law" and stating women "enjoy equal rights with men").

rights and interests. The reform era and the marketization of Chinese society have opened doors for many women to become entrepreneurs and professionals, creating opportunities beyond simply taking the jobs of their mothers or fathers.² The phenomenon of female entrepreneurs aside, the economic reforms have generally caused women in China to lose their jobs at a rate disproportionate to men and have effectively moved women farther away from the equality promised by the constitution, especially in the area of labor.

The problem of gender-based labor inequality is global.³ Women all over the world are paid fifteen to fifty percent less than men working the same jobs, and both societal and biological-based explanations have been used to justify this disparity. Women are presumed less capable physically and mentally than men, and men are believed to have greater need of the income because they are presumed to be the primary providers of the family unit.⁴ In the United States, women make up less than thirteen percent of the board members of large corporations, and only two percent of the heads of Fortune 500 companies.⁵ It is not only in China that a woman's workplace was once limited exclusively to the home, and is today concentrated disproportionately in low-income jobs.⁶ As women in the United States and Europe discuss the "glass ceiling" and ways that society and the law can both impede and facilitate equality for women in the workplace, China's unique legal and cultural environment provides another arena for understanding this global issue. By examining the problem in China's distinct setting and by observing how international law and influence have affected gender discrimination in China, women in other countries can gain a more comprehensive understanding of the global problem of employment discrimination and its persistence.

In this Note, I provide an in-depth study of the problem of gender-based employment discrimination in China, discussing how international influence and China's participation in the international community have affected the government's current position on gender-

2. See generally GAIL HERSHATTER, *WOMEN IN CHINA'S LONG TWENTIETH CENTURY* 64-78 (2007) (discussing women's work in the reform era).

3. Kenneth G. Dau-Schmidt, 4 *IND. J. GLOBAL LEG. STUD.* 51, 53 (1996-97) ("In general, women have never fared as well as men in the problem of dividing the cooperative surplus from economic or social relationships. In 1980 the United Nations estimated that although women did two-thirds of the world's work, they earned only one-tenth of the world's income and owned only one-hundredth of the world's property.").

4. Jill Steans, *The Gender Dimension*, in *THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE* 366, 367 (David Held & Anthony McGrew eds., 2003).

5. *Female Power*, *THE ECONOMIST*, Jan. 2, 2010, at 50.

6. Steans, *supra* note 4, at 367-68.

based discrimination and how Chinese women use law as a means of preventing discrimination. I first introduce historical and Maoist perceptions of women in China, followed by a discussion of how China's involvement in international conferences and treaties has affected Chinese women's labor rights. Next, I explain early domestic laws and regulations, address the benefits and failings of these laws, and describe how they have been influenced by China's international affairs. Last, I consider how new laws being promulgated under China's current political goal of "achieving a socialist harmonious society" may further women's interests, as well as where room for improvement remains.

I. DISCRIMINATION AGAINST WOMEN IN CHINA TODAY

The disparity between the employment of men and the employment of women in China today has become increasingly visible. According to China's National Bureau of Statistics, women make up approximately forty-five percent of the country's workforce, but on average the salary of a working Chinese woman is seventy-four percent less than that of a man's wage.⁷ In 2000, men held four times as many high-ranking positions as women in businesses, the government, or social institutions.⁸ In 2002, women held twice as many jobs as men that paid under 500 RMB a month; men held one and a half times as many jobs as women that paid 2,000 RMB or more a month.⁹

While the unemployment rates of both men and women in China vary, women who are not employed overwhelmingly work as homemakers. In 2000, for example, seventy-three percent of women between the ages of thirty and thirty-four who were unemployed did not hold jobs outside of the home because they were managing household affairs. In contrast, only about four percent of unemployed men in this age group were sacrificing paid employment to take care of their families.¹⁰

Gender-based discrimination is visible among young people and college graduates, as well. This is shown by a survey conducted by the Women's Federation of Jiangsu Province.¹¹ This survey reported that

7. DEP'T OF POPULATION, SOC. SCI., & TECH., NAT'L BUREAU OF STATISTICS, WOMEN AND MEN IN CHINA, FACTS AND FIGURES 36 (2004), available at http://www.stats.gov.cn/english/statisticaldata/otherdata/men&women_en.pdf [hereinafter WOMEN AND MEN IN CHINA].

8. *Id.* at 44.

9. Ronald C. Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361, 373 (2006).

10. WOMEN AND MEN IN CHINA, *supra* note 7, at 47.

11. Xun Zeng, *Enforcing Equal Employment Opportunities in China*, 9 U. PA. J. LAB. & EMP. L. 991, 999 (2007).

among a group of 1,100 college graduates, eighty percent of female graduates reported that they had experienced gender discrimination in their employment search. When comparing college graduates with identical qualifications, the employment rate of males was eight percent higher than that of females.¹² Moreover, it is likely that statistics drastically understate the number of women turned away from jobs and promotions on the basis of their gender and the ways in which women are limited in the kinds of employment they may seek.¹³

II. THE HISTORY OF WOMEN'S ROLES IN CHINA PRIOR TO THE REFORM ERA

In order to understand women's roles in the workforce in China today, and the reasons behind current laws and policies the Chinese government has passed to improve the labor situation for women, one must have a certain amount of cultural and historical perspective. I will briefly address the role of women in China before the Chinese Communist Party (CCP) took power in 1949 and explain how this role changed after the transition in government. I will then apply this history to explain the changes of the reform era that began in 1979 and have formed the situation today. This background on the historic role of women in China will provide a foundation for understanding how ongoing societal perception of women affects their place in the current labor market as well as government labor reforms.

A. *"Husband's Assistant and Son's Teacher"*¹⁴: China Pre-1949

A woman's traditional role in China was found within the home, where her purpose was to care for her husband and raise sons.¹⁵ This role was enforced for centuries by Confucian teachings that instructed "it is a virtue if a woman has no ability" and generally taught women to be subordinate to men.¹⁶ Practices such as foot binding, polygamy, and

12. *Id.*

13. *But see* WOMEN AND MEN IN CHINA, *supra* note 7, at 36 (noting "women's employment is concentrated in farming, forestry, animal husbandry and fishery; manufacturing; wholesale and retail sale trade and catering; education, culture, arts and broadcasting, films and TV").

14. Yong-Qing Fang, *Women's Development in Hebei Province, PRC*, in *THE EMPLOYMENT OF WOMEN IN CHINESE CULTURES: HOLDING UP HALF THE SKY* 157, 163 (Cherlyn S. Granrose ed., 2005).

15. *Id.*

16. Allison J. Wells, *Chinese Women Experience A Negative Side Effect of the Growing Private Sector in Gender Based Employment Discrimination*, 6 *IND. INT'L & COMP. L. REV.* 517, 525 (1996).

patrilineal wealth distribution, as well as notions like "an incapable man is better than a capable woman" permeated society and prevented women from joining the workforce.¹⁷ At the turn of the century, however, women began to demand a different position in society.¹⁸

The 1911 Revolution and the eventual establishment of the Nationalist government provided women with the opportunity to change many of these traditional practices.¹⁹ Since the Nationalists never had a firm grip on power in China, they did not make gender equality a priority. However, the government did include pro-women reforms among the many changes it made. These reforms included outlawing foot binding, promoting universal education, and discouraging polygamy.²⁰ Women began pursuing higher levels of education and left the home to work in factories or even pursue professional jobs.²¹ While they may have been allowed to join the workforce, prior to 1949 women had reason to hesitate. First, there were few jobs that were considered suitable for women. Second, women received significantly lower pay than did their male counterparts. Third, and most importantly, women employed outside of the home often faced overwhelming societal disapproval and were considered to be little better than prostitutes.²² During this time, women made up approximately seven and a half percent of the workforce.²³

B. Half the Sky: The Status of Women Post-1949

When the Chinese Communist Party took power from the Nationalists in 1949 and formed the People's Republic of China, its platform of equality for the masses included women.²⁴ The CCP ratified its first constitution in 1954 and declared women to be full citizens.²⁵ Article 91 of the constitution gave women "equal rights with men in all areas of political, economical, cultural, social, and domestic life."²⁶ New laws and regulations allowed a woman to obtain a divorce, own

17. Yong-Qing Fang, *supra* note 14, at 162. See also Anna M. Han, *Holding-Up More than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791, 793-95 (2000-2001).

18. HERSHATTER, *supra* note 2, at 80-85.

19. *Id.* at 52-59.

20. Han, *supra* note 17, at 796.

21. *Id.*

22. Christine M. Bulger, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 350 (2000-01).

23. *Id.*

24. Han, *supra* note 17, at 796.

25. *Id.* at 797.

26. *Id.*

property, pursue a formal education,²⁷ and receive equal pay for equal work.²⁸ In addition to providing such equality measures, the CCP considered women's contribution to the workforce to be an "integral part of state development,"²⁹ coining slogans to encourage women's participation, such as Mao Zedong's "women hold up half the sky"³⁰ and "anything a man can do, a woman can do also."³¹

The ambitious reforms for women's rights and equality, however, did not always amount to significant substantive change for women. The efficacy of these reforms was limited by societal norms, which in many ways remained unchanged (and still remain unchanged today). For example, parents often considered paying for daughters to receive more than the most basic education to be a waste of resources, making the legal possibility of women receiving an education irrelevant to many.³² In addition, the policy of "equal pay for equal work" was implemented and effectively managed to provide men and women with similar incomes for similar positions.³³ However, the policy did not account for Chinese society's reluctance to leave behind traditional "male generals and female foot soldiers" mentalities and the resulting discrepancies in pay that women faced as men were promoted over them.³⁴ Similarly, the government implemented different wages from industry to industry, often assigning a lower pay scale to "women's" industries like textiles and collective enterprises.³⁵ When the CCP used work points,³⁶ "heavy" jobs such as those working with draft animals or machines—typically jobs reserved for men—were given more work points, and women received fewer points even if their work was more labor intensive or profitable.³⁷ Moreover, many Chinese women may never have even seen their wages, as a whole household's work points were often given to the

27. *Id.*

28. Yongping Jiang, *Employment and Chinese Urban Women Under Two Systems*, in *HOLDING UP HALF THE SKY* 207, 213 (Tao Jie et al. eds., 2004).

29. HERSHATTER, *supra* note 2, at 60.

30. Bulger, *supra* note 22, at 350.

31. HERSHATTER, *supra* note 2, at 61.

32. Han, *supra* note 27, at 802.

33. Yongping Jiang, *supra* note 28, at 213.

34. *Id.*

35. *Id.*

36. See CHARLES HOFFMANN, *WORK INCENTIVE PRACTICES AND POLICIES IN THE PEOPLE'S REPUBLIC OF CHINA 1953-1965*, at 18 (1967) (explaining that the work point, or wage point, system was utilized in communist China prior to 1956 as a means of measuring the jobs performed by citizens in order to provide compensation; certain jobs merited more work points, and more work points merited a larger amount of coal, oil, salt, cotton, or other daily staples).

37. HERSHATTER, *supra* note 2, at 63.

head of the household (who was usually male).³⁸

Despite the fact that the CCP was promoting the role of women in the workforce, early on the Party established a practice of encouraging women to work when workers were needed and sending them home before men when the workforce was saturated.³⁹ For example, from 1953 to 1957 (the "First Five Year Plan"), unemployment was high, and the government told women to serve the cause at home, emphasizing the importance of domestic work.⁴⁰ During other periods, however, such as the Great Leap Forward (1958-1960), the government encouraged women to join the labor force, usually so that they would take unskilled work and free male workers for skilled projects.⁴¹ The government provided nurseries, laundries, and other incentives to women so that they would be able to work outside the home, because, regardless of their jobs outside the home, a woman was still considered responsible for domestic chores and her family's general well-being.⁴² The concept of the "iron rice bowl" emerged in this period, in which the state compensated both men and women for their work with a salary, medical care, housing, childcare, and even education.⁴³

During the period of the Cultural Revolution (1966-1976), women's participation in the workforce increased, with some women even taking leadership positions and jobs that were traditionally held by men.⁴⁴ Official communications began depicting women as fighters and workers alongside men, creating a new perception of women that has been referred to as "socialist androgyny."⁴⁵ Women were exalted for their strength and capacity for hard work and were discouraged from showing off feminine attributes.⁴⁶ Despite the ways in which it would seem that women's position in society could be advanced by these policies, gender discrimination remained ingrained in Chinese society even at the heart of the Cultural Revolution. The strong woman was depicted under the supervision of a guiding male figure; even the revolutionary female Red Guards recorded memoirs relating the shock they felt at the gender discrimination that remained in their country despite official discourse.⁴⁷ In total, the Cultural Revolution was a period of economic

38. ELLEN R. JUDD, *THE CHINESE WOMEN'S MOVEMENT BETWEEN STATE AND MARKET* 4 (2002).

39. HERSHATTER, *supra* note 2, at 60.

40. *Id.*; Bulger, *supra* note 22, at 350.

41. HERSHATTER, *supra* note 2, at 60-61.

42. Bulger, *supra* note 22, at 350.

43. *Id.* at 351.

44. JUDD, *supra* note 38, at 4.

45. HERSHATTER, *supra* note 2, at 95-96.

46. *Id.* at 96-97.

47. *Id.* at 95-96.

and social chaos (for reasons that go beyond the scope of this Note), and what little advancement women made during this period was lost with the reforms of the late 1970s and early 1980s.

Notably, there was a great distinction between the government's treatment of workers in urban and rural parts of China. During the Mao era, "urban women employees enjoyed pay, benefits and security of which their rural sisters could only dream."⁴⁸ Urban employment was guaranteed, and urban women looked down on housewives for not taking part in the plan for social production, while unemployment in rural areas was a part of life.⁴⁹ With studies and statistics that examine China as a whole, it is important to take this into account, realizing that such generalized employment statistics do not even begin to consider the disparity between urban and rural areas, much less the vast differences that arise from province to province. This gap, which has continued beyond the Mao era, is visible in a 1990 survey conducted by the Women's Federation. This survey demonstrated that approximately 83 percent of urban women had pensions compared to only about 6 percent of rural women; there were similar disparities in paid maternity and sick leave.⁵⁰

III. REFORM AND THE EFFECTS OF MARKETIZATION ON WOMEN IN THE WORKFORCE

Following the death of Mao Zedong and the end of the Cultural Revolution, the Chinese government under the leadership of Deng Xiaoping began to make sweeping changes in an effort to improve the economy and restore the party's credibility in the eyes of the people. This involved a new ideological thrust toward the marketization of the Chinese economy and the opening up of the country to foreign nations.

A. *General Effects of Reform*

Marketizing the economy meant changing the entire labor system, and because the government made economic reform a priority, it was considered acceptable that some negative consequences, such as inequality or gender discrimination, might result from pursuing the overarching goal.⁵¹ The government eliminated the "iron rice bowl"

48. Wang Zheng, *Gender, Employment, and Women's Resistance*, in CHINESE SOCIETY: CHANGE, CONFLICT, AND RESISTANCE 158, 160 (Elizabeth J. Perry & Mark Selden eds., 2d ed. 2003).

49. *Id.* at 159, 160.

50. *Id.* at 160.

51. HERSHATTER, *supra* note 2, at 64.

system and certain types of job security, such as children's inheritance of their parents' employment.⁵² Competition was high and jobs were limited; as in the years before, it was assumed that women, the weaker, less capable members of society, should be the ones to return to the home.⁵³ As Jieyu Liu explains, "During the reform era, the Maoist image of strong, heroic women workers was ridiculed as a symbol of backward obstacles to China's modernization."⁵⁴ During the early years of the reform, women's labor participation declined by approximately seven percent so that they made up only one third of the non-agricultural workforce.⁵⁵

Another result of the reform era was the limitation in the kinds of jobs available to women. Women who, during the Cultural Revolution, had stepped into leadership roles and professions that were not typical for women found themselves losing work at a greater rate than others. Females in leadership roles were often forced to transfer or retire, or were otherwise marginalized.⁵⁶ Women lost jobs that were considered dangerous or were in heavy industry as people criticized "Maoist disregard for 'natural' sex differences."⁵⁷ Typical women's work and lower paying jobs in collective industries and fields like catering, textiles, and healthcare, remained open to women.⁵⁸ Overall, women had less job mobility than men and earned drastically less than men throughout the reform era, and these trends continue today.

As the reforms continued and the Chinese economy improved, the status and role of women remained stagnant or even declined. In 1996, *China Business Review* cited gender discrimination as the "main reason for the lower representation of Chinese women in high paying jobs."⁵⁹ While women's participation in the workforce increased from about thirty percent during the early years of the reform to forty percent in the 1990s, their comparative pay decreased; in 1988 women made fifty-five percent as much as men, but this figure declined to forty-two

52. Brown, *supra* note 9, at 365.

53. JIEYU LIU, GENDER AND WORK IN URBAN CHINA: WOMEN WORKERS OF THE UNLUCKY GENERATION 143-44 (2007). See generally Charles J. Ogletree & Rangita de Silva-de Alwis, *When Gender Differences Become a Trap: The Impact of China's Labor Law on Women*, 14 YALE J.L. & FEMINISM 69, 74-75 (2002) (providing information about China's "return home" policies).

54. JIEYU LIU, *supra* note 53, at 143.

55. HERSHATTER, *supra* note 2, at 66.

56. JUDD, *supra* note 38, at 4.

57. HERSHATTER, *supra* note 2, at 64.

58. *Id.* at 66.

59. Bulger, *supra* note 22, at 355.

percent by 1994.⁶⁰ Women were increasingly finding paid jobs outside of the home, but perceptions that women were incapable of being leaders, that women were less competent both physically and mentally, and that males would not respond well to a female boss kept women out of higher paying technical or managerial positions.⁶¹

Gender discrimination in China from the 1990s through today is visible in hiring, dismissal, earlier retirement, fines for violation of family planning regulations, wage differences, denial of certain social welfare benefits, and sexual harassment.⁶² Laws and regulations (discussed below) that are meant to protect women require employers to provide female employees with expensive benefits related to maternity, child care, and basic gender differences (whether biological or merely perceived), making female employees much more expensive to employ than male employees.⁶³ These regulations force women to retire at an earlier age than men, and this leaves them with lower pensions even when men's and women's benefits are supposedly the same.⁶⁴ Work units have been known to deny women's requests to have children, force women to sign contracts stating that they will not become pregnant, or fire female workers, especially migrant workers, for becoming pregnant.⁶⁵ In addition, women in Chinese society continue to be considered the primary caregivers, and they bear the majority of that burden now that the government and even the work unit, in many cases, no longer provide for childcare or other domestically related

60. HERSHATTER, *supra* note 2, at 66-67 (noting discrepancy depending on economic sector, but an overall decline in women's participation in the workforce).

61. Bulger, *supra* note 22, at 355.

62. Various regulations, discussed below, have addressed some of these problems, though many of these difficulties continue to confront women in the workforce. See U.S. DEPT' OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., & LAB., 2007 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Mar. 11, 2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>. The report explains that "there were laws designed to protect women . . . However, in practice some discrimination based on . . . gender . . . persisted . . . The Law on the Protection of Women's Rights and Interests was designed to assist in curbing gender-based discrimination. However, women continued to report that discrimination, sexual harassment, unfair dismissal, demotion, and wage discrepancies were significant problems. According to a survey by the ACWF, 50% of female migrant workers, versus 40% of male migrants, had no labor contract with their employers." *Id.*

63. HERSHATTER, *supra* note 2, at 66.

64. Brown, *supra* note 9, at 391.

65. Bulger, *supra* note 22, at 346-48; U.S. DEPT' OF STATE, *supra* note 62 (stating that "ACWF studies also showed that 21 percent of rural women working in cities were fired after becoming pregnant or giving birth and that some women delay motherhood for fear of losing job and promotion opportunities").

benefits.⁶⁶

B. Migrant Workers

In addition to increasing employment discrimination against women, economic reforms also led to a surge of migrant laborers (called *mingong* or *mangliu*), with women in the majority.⁶⁷ Beginning in the 1980s, individuals from rural parts of China flooded the cities seeking temporary employment.⁶⁸ Rural areas have not benefitted from the reforms to the same extent as cities,⁶⁹ and so rural workers come to the cities in droves seeking increased income, improved job opportunities, and a higher standard of living.⁷⁰ Young women are especially likely to take the risk of moving to the city in order to find a job.⁷¹ Not only does a family often support its daughter's move because it means one less mouth to feed,⁷² but the relocation also provides the daughter with an escape from familial obligations and undesired marriage proposals and can provide her with the financial means to pursue career or marriage goals.⁷³

Migrant workers face particular discrimination within the Chinese workforce. The national *hukou*, or residency system, prevents rural individuals from permanently migrating to cities, though it has been relaxed in recent years to permit some urban workers with steady employment to change residencies.⁷⁴ Observing local discrimination against migrant workers, scholars have referred to these workers as

66. Han, *supra* note 17, at 804; Ogletree & de Silva-de Alwis, *supra* note 53, at 78 ("Chinese labor law thrusts child-bearing and child-rearing responsibilities entirely upon women.").

67. CHING KWAN LEE, *GENDER AND THE SOUTH CHINA MIRACLE* 68 (1998) (citing studies that found that women made up the majority of the migrant population).

68. *Id.* at 67.

69. PUN NGAI, *MADE IN CHINA: WOMEN FACTORY WORKERS IN A GLOBAL WORKPLACE* 73 (2005) (discussing the economic inequality between rural and urban China).

70. CHING KWAN LEE, *supra* note 67, at 71.

71. *Id.* at 75.

72. *See id.* (explaining that rural women often did not receive family resources for education or training because such support was usually reserved for male children, and migrating to the city to look for work often relieved the family of an additional financial burden).

73. *See id.* at 79-81 (discussing how women would work in order to save for college or trade school tuition or a dowry).

74. *See* Cindy C. Fan, *Migration, Hukou, and the City*, in *CHINA URBANIZES: CONSEQUENCES, STRATEGIES, AND POLICIES* 65, 67-68 (Shahid Yusuf & Anthony Saich eds., The World Bank 2008) (discussing how the *hukou* system creates temporary workers).

"foreigners within the cities of their own country."⁷⁵ Migrant workers are often paid dastardly low wages (or no wages at all) and are forced to labor under poor conditions, and entire provinces have been known to prohibit the hiring of migrant workers from outside provinces because of the threat they pose to local wages and social order.⁷⁶ Indeed, in provinces that permit the enormous influx of migrant workers, women over the age of thirty-five often have difficulty finding jobs due to the unending supply of young, inexpensive workers.⁷⁷ Urban workers, local media, and local authorities are often openly antagonistic toward *mingong*, and cities have even used public security personnel to forcibly remove migrant workers.⁷⁸ Recently, however, the Chinese government has gone to noticeable lengths to prevent discrimination and promote harmony among urban and rural workers, and these changes are providing hope for greater balance between the labor rights of resident and migrant workers, both men and women.⁷⁹

IV. THE INFLUENCE OF INTERNATIONAL LAW AND THE GLOBAL WOMEN'S MOVEMENT

Along with the economic reforms of the 1980s, China began opening up to the Western world after decades of distrusting international influence. Since its founding in 1949, the newly-formed Chinese government had expressed a mistrust of international law, and the United Nations, in turn, did not recognize the PRC as the legitimate government of China until 1971—twenty-two years later.⁸⁰ After the United Nations' recognition of the PRC, China began to improve relations with the western world by taking part in international conferences and even signing treaties to protect disadvantaged groups. These conferences and treaties had a distinct influence on domestic laws

75. DOROTHY J. SOLINGER, *CONTESTING CITIZENSHIP IN URBAN CHINA: PEASANT MIGRANTS, THE STATE, AND THE LOGIC OF THE MARKET* 4 (1999).

76. CHING KWAN LEE, *supra* note 67, at 57-58. *See also* PUN NGAI, *supra* note 69, at 74-75 (describing the influx of migrant workers flooding local train stations and discriminatory policies adopted by the local authorities to disperse them).

77. *See* CHING KWAN LEE, *supra* note 67, at 169.

78. PUN NGAI, *supra* note 69, at 74-75.

79. *See* Na Lan, Note, *Is There New Hope in Labor Rights Protection for Chinese Migrant Workers?*, 10 *ASIAN-PACIFIC L. & POL'Y J.* 482, 488-89 (2009). Just prior to publication of this Note, an insightful article was published detailing current attempts to reform the *hukou* system in Guangdong and Sichuan provinces. *See Migration in China: Invisible and Heavy Shackles*, *THE ECONOMIST*, May 6, 2010, available at http://www.economist.com/displaystory.cfm?story_id=16058750.

80. Paul D. McKenzie, *China and the Women's Convention: Prospects for the Implementation of an International Norm*, 7 *CHINA L. REP.* 21, 25 (1991-93).

concerning labor discrimination against women.

In 1975, for example, representatives from China were present at the International Women's Assembly held in Mexico City, the first international forum on women's development, where the Assembly drafted the World Action Plan for Women's Development.⁸¹ China continued its international participation in women's rights by attending the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979⁸² and admitting, for the first time, that the status of women's rights in China had room for improvement. China then became one of the first nations to ratify the treaty,⁸³ and it continues to submit progress reports under the Convention.⁸⁴

In 1990, China showed a renewed interest in the status of working women with the signing of another treaty: the International Labor Organization (ILO) Convention for Equal Remuneration for Equal Work.⁸⁵ At that time, however, China stopped short of ratifying the ILO Convention on Employment and Occupational Discrimination.⁸⁶ China's reasons for not ratifying both conventions are not clear given that the government had already recognized the problem of employment discrimination against women. In fact, in 1994, largely in response to international prodding in the form of the Report on Implementation of Nairobi Forward Looking Strategies for the Advancement of Women (a product of the 1985 Third World Conference on Women), China acknowledged the problem of gender discrimination in employment situations and stated that the government was dedicated to solving these problems through legislation such as the Law on the Protection of Rights and Interests of Women.⁸⁷ The government also pledged that it would make sure that this law was fully implemented.⁸⁸ In addition, China issued a white paper report in 1994 entitled "The Situation of Chinese Women," which gave statistics on gender discrimination.⁸⁹

81. Yong-Qing Fang, *supra* note 14, at 157.

82. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-8&chapter=4&lang=en.

83. See Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (Dec. 18, 1979).

84. Brown, *supra* note 9, at 390.

85. Xun Zeng, *supra* note 11, at 1014.

86. Brown, *supra* note 9, at 390 & n.158.

87. Bulger, *supra* note 22, at 352-53 (noting that in admitting the existence of gender discrimination, China placed much of the blame on the discriminatory actions of private and foreign-owned and operated businesses).

88. See *id.*

89. See White Paper, The Situation of Chinese Women (Information Office of the State Council of the People's Republic of China, June 1994), available at <http://www.china.org.cn/e-white/chinesewoman/11-2.htm>.

In 1995, China hosted the Fourth World Conference on Women in Beijing (Beijing Conference). By lobbying to host this conference, China showed both a continuing dedication to improving relations with the international community and an interest in promoting women's rights in China. Though the primary goal of the conference was development and peace, a secondary goal was to address gender-related employment problems.⁹⁰

In the years after the Beijing Conference, China continued to interact with international actors and obtained membership in the World Trade Organization. For example, on December 1, 2006, China finally ratified the ILO Convention on Employment and Occupational Discrimination, agreeing "by methods appropriate to national condition and practice to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy."⁹¹ China's commitment to upholding the goals of this convention can be seen in legislation passed in 2007, such as the Employment Promotion Law and the Labor Contract Law, which I describe below.

Some would argue that these international conventions have little tangible effect on women's labor equality in China. International conventions, though technically enforceable against nation-states through the International Court of Justice, are often difficult to enforce in practice and may still be superseded by local law.⁹² Though the ILO has enforcement provisions, it must often resort to soft power, such as public shaming or providing incentives for compliance such as funding or technology.⁹³ In an ideal world, conventions such as CEDAW and the ILO would be implemented perfectly in every country, but for now, the value of these international treaties to China is found not so much in the threat of punishment for not complying, but in the standard the treaties set domestically.

As China has participated in international forums and signed treaties stating its commitment to protecting women's labor rights, it has also passed enforceable legislation that protects women's interests. In ratifying these treaties, China has publicly proclaimed its values and goals for women's participation in the labor force and established expectations for the Chinese people. It has created a goal for the

90. Yong-Qing Fang, *supra* note 14, at 158.

91. Xun Zeng, *supra* note 11, at 1014-15 (quoting International Labor Organization, Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31).

92. M. Ulric Killion, *Post-WTO China: Quest for Human Rights Safeguards in Sexual Harassment Against Working Women*, 12 TUL. J. INT'L & COM. L. 201, 230-31 (2004).

93. Xun Zeng, *supra* note 11, at 1015-16.

government to meet in the creation and enforcement of domestic legislation. In the next section, I trace this international influence through specific domestic laws.

V. DOMESTIC LAWS AND LIMITATIONS

In the past twenty-five years, China has done much to promote women's rights and equality in the labor context, with international actors and treaties having influenced many of these actions. These advancements, however, are burdened by a number of limitations that prevent them from truly advancing women's labor rights or preventing gender-based employment discrimination. These limitations include the following: applying stereotypes that reinforce traditional notions of gender inequality, providing insufficient enforcement mechanisms, creating disincentives for employers to hire women, requiring excessive time and expense in order to litigate, and not specifying great enough sanctions for violators. I first address the early laws and regulations affecting gender discrimination in the workplace, how the international community shaped each of these laws in some way, and which of the aforementioned limitations restrict the efficacy of each law. Then, I briefly address a number of other issues facing labor law in China that do not apply specifically to the laws I have mentioned but are much broader problems facing women and Chinese law in general. Finally, I discuss the laws implemented in the last year prior to writing this Note, how they might address these problems, and what issues remain.

A. *Early Domestic Laws and Regulations*

The first notable constitutional promotion of women's rights can be found in the 1982 PRC Constitution, which provides: all citizens are "equal before the law" (Article 33); "women . . . enjoy equal rights with men in all spheres of life, political, economic, cultural and social, and family life" (Article 48); and "[t]he state protects the rights and interests of women, applies the principle of equal pay for equal work . . . and trains and selects cadres from among women" (Article 48).⁹⁴ While these broad provisions seem to convey a variety of positive rights that largely comply with CEDAW requirements, the Chinese Constitution is not self-executing; it is meant to be a guide for legislators (and the judiciary, to some extent) to follow and can only be enforced if there is a national law that articulates a given doctrine.⁹⁵

94. XIAN FA art. 48.

95. See Brown, *supra* note 9, at 388-89; see also Killion, *supra* note 92, at 226-27.

The Labor Protection Regulations, passed in 1988,⁹⁶ were the first step taken by the Chinese government after the drafting of the Constitution to put some of its values for women and labor into effect. The regulations, however, are riddled with problems. They set standards for future laws that promote stereotypes of women's weakness and the traditional role of a woman as family caretaker by advocating the creation of health clinics, child care centers, breast feeding rooms, and other services for women (seeming to expect the employers to be the providers of these services).⁹⁷ In addition, the regulations created a variety of restrictions and special provisions based on biological characteristics. For example, women were banned from underground mining and "high intensity" work; employers were required to provide women with maternity leave and child care; women were not permitted to work at high altitudes, in cold water, and at low temperatures while they were menstruating; and employers were not allowed to employ women to perform jobs that "should not be done during pregnancy" or while breast feeding.⁹⁸ Ultimately, the 1988 Labor Protection Regulations did not greatly affect women or employers' actions when they were passed, but they provided a foundation for future legislation.

In 1992, the government drew from the Labor Protection Regulations of 1988 and Article 48 of the Constitution in passing the Law on the Protection of Rights and Interests of Women (LPRIW). This law has been moderately revised and is still in effect today. The law follows the ILO Convention for Equal Remuneration for Equal Work, which China signed recently. It articulates not only that women shall receive equal pay, but also provides a number of other protections for women, including prohibiting termination of contract on the basis of marriage, pregnancy, maternity leave, or lactation, and demanding equal hiring standards for men and women.⁹⁹ The law also implements several important provisions of CEDAW, including specifically allowing affirmative action in certain organizations: In "[s]tate organs, public organizations, enterprises and institutions . . . there shall be an appropriate number of women leading members."¹⁰⁰ In addition, the law addressed the All-China Women's Federation (ACWF) and approved its

96. Bulger, *supra* note 22, at 361; Han, *supra* note 17, at 801.

97. *Cf.* Bulger, *supra* note 22, at 361-62; Han, *supra* note 17, at 801.

98. Bulger, *supra* note 22, at 361-62; Han, *supra* note 17, at 801.

99. Law on the Protection of Rights and Interests of Women (adopted by the Nat'l People's Cong., Apr. 3, 1992, effective Oct. 1, 1992), arts. 23, 24, 26 (amended 2005) (P.R.C.), available at http://www.npc.gov.cn/englishnpc/Law/200712/12/content_1383859.htm [hereinafter LPRIW].

100. *Id.* art. 12.

direct involvement in state decision-making processes.¹⁰¹

Disappointingly, in drawing from what Bulger has described as “existing sexist policies”¹⁰² of the 1988 Labor Protection Regulations, the passing of the LPRIW only reinforced traditional notions of women’s capabilities in China. According to Bulger, “Such protective legislation has its roots in traditional patriarchal and hierarchical Confucian principles that define a woman’s primary obligation as the perpetuation of the family, or more specifically, producing and wisely raising a male descendent.”¹⁰³ For example, by requiring employers to provide female employees with childcare, this law reinforces women’s role as primary caretaker. Also, the LPRIW states that women and men are to be held to the same hiring standards *except* for special types of work or jobs that are “unsuitable for women.”¹⁰⁴ The law makes no effort to define unsuitable jobs, potentially leaving this determination to the discretion of the employer. Additionally, the LPRIW initially mandated a younger retirement age for women than for men, though the 2005 amendments provide that retirement age discrimination is not permitted.¹⁰⁵ Thus, by enforcing stereotypes and limiting employment opportunities, the law actually went *against* CEDAW.¹⁰⁶

The LPRIW makes it more difficult for women to get hired in China. Allowing employers to refuse to hire women for tasks that are “unsuitable for women” created an opening for employers to discriminate, arguably in violation of the Constitution. Furthermore, as a result of the law’s protectionist provisions, many employers perceive women as more expensive employees; this has caused increased discrimination against women, as employers ignore anti-discrimination provisions and look to hire employees who will not demand childcare or maternity leave.¹⁰⁷

A woman who has experienced employment discrimination has three options: she may pursue mediation, pursue arbitration, or file a

101. *Id.* art. 1. See generally Bulger, *supra* note 22, at 357 n.106 (explaining that the ACWF is a national government sponsored organization); Human Rights in China, *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 WOMEN’S RTS. L. REP. 285, 305 (1996) (“The primary function [of the ACWF] is to transmit the Party’s policies to women and to mobilize them to implement those policies.”).

102. Bulger, *supra* note 22, at 366.

103. *Id.* at 348-49.

104. LPRIW, art. 22.

105. *Id.* art. 27. But cf. Brown, *supra* note 9, at 391 (noting that as of 2006, different retirement ages for men and women were still set by law); Li Xing, *Gender Inequality Still Rife*, CHINA DAILY, Nov. 15, 2007, available at http://www.chinadaily.com.cn/opinion/2007-11/15/content_6257468.htm (noting that in 2007 women employed by the Chinese state still had to retire at age 50, men at age 60).

106. See CEDAW, arts. 5, 11.

107. See HERSHATTER, *supra* note 2, at 66.

civil suit.¹⁰⁸ A woman who wishes to pursue mediation or arbitration is instructed by the law to report the complaint to the ACWF, her local women's organization, or directly to the relevant government department (to whom the women's organizations would have to report the complaint).¹⁰⁹ The government organization then has the discretion to investigate the violation. Notably, the earlier versions of the LPRIW prevented a woman from litigating unless the violator of the LPRIW also violated another law or regulation that provided a specific procedural and substantive basis for legal action.¹¹⁰ This complication, however, has been adjusted so that not only are women able to file a civil suit against an employer, but the law also contains a provision that benefits women in strained financial circumstances who wish to pursue this course of action.¹¹¹ Still, the LPRIW is limited in that it does not provide any specific sanctions or penalties, and often the rewards from such suits are too minimal to justify the time spent litigating.¹¹² Due to its many limitations, the law has been criticized for being "more a source of slogans and less a force for political action."¹¹³

The Labor Law, passed in 1994, provides Chinese women with additional labor protections.¹¹⁴ It states, among other things, that women have an equal right to employment (except for work "unsuitable for women") and provides that no employer may raise the employment standards for women or refuse to employ a woman on the basis of gender.¹¹⁵ This effort to put a stop to gender-based employment discrimination was largely driven by international encouragement for China to acknowledge the existence of gender discrimination and pass legislation to prevent it.¹¹⁶ The Labor Law echoes the LPRIW and earlier labor regulations by providing women with additional protections when they are menstruating or pregnant. These paternalistic, protectionist measures have been criticized for the way they prevent women from determining for themselves what jobs they are physically capable of by "protecting" them from being hired in

108. LPRIW, art. 52. For a detailed description of the dispute resolution process in China, see VIRGINIA HARPER HO, LABOR DISPUTE RESOLUTION IN CHINA 45-81 (2003).

109. LPRIW, arts. 52, 53.

110. Bulger, *supra* note 22, at 366.

111. LPRIW, art. 52.

112. Yong-Qing Fang, *supra* note 14, at 162.

113. *Id.* at 163.

114. Labor Law (adopted by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), available at http://www.npc.gov.cn/englishnpc/Law/200712/12/content_1383754.htm.

115. *Id.* arts. 12, 13.

116. See Bulger, *supra* note 22, at 352-53 (discussing a Third World Conference on Women report in which China acknowledged gender discrimination in employment).

positions that are deemed too hazardous or strenuous for a woman.¹¹⁷ Notably, in passing the Labor Law, the government attempted to address the problem of pregnant women being laid off (a practice that presumably worsened with the added requirements imposed on employers with the LPRIW) by dictating that a labor contract may not come to a close while a woman is pregnant, on maternity leave, or breast feeding.¹¹⁸ This requirement, however, has worsened the situation, since employers then began to choose not to create contracts with women who they feared would become pregnant.¹¹⁹

The 1994 Labor Law has a specific enforcement mechanism and effectively gives women a basis for action against employers.¹²⁰ Specifically, the enforcement provisions of the Labor Law require violators to provide the employee who has been discriminated against with economic compensation (though it does not specify compensation amounts).¹²¹ One drawback of the Labor Law is that it only protects those who have an employment relationship, meaning that the law does not protect applicants for employment.¹²² Additionally, litigation is expensive, and women are often unable to afford the costs of a lawyer or court fees;¹²³ or the prospective gains simply do not justify the cost of litigation.

Those employees who do decide to pursue litigation either under the Labor Law or the LPRIW have to go through a lengthy process, first bringing the labor dispute to the Labor Bureau's Labor Arbitration Commission, paying a fee, and then waiting for an arbitration tribunal to convene.¹²⁴ Only after going through the process of mediation and arbitration can an individual opt to present her case before a court.¹²⁵ An individual or employer, after arbitration, can appeal the decision to the People's Courts,¹²⁶ but it has to be done within fifteen days of the decision, and this often makes it difficult to timely secure legal assistance.¹²⁷ A case can go through a lengthy process of a first, second,

117. Ogletree & de Silva-de Alwis, *supra* note 53, 76-77.

118. Labor Law, art. 29.

119. Ogletree & de Silva-de Alwis, *supra* note 53, at 76; Zhang Tingting, *Disregard for Women Workers' Rights Uncovered*, China.org.cn, Jan. 3, 2005, available at <http://www.china.org.cn/english/2005/Jan/116585.htm>.

120. See Labor Law, art. 95; see also Brown, *supra* note 9, at 413.

121. Labor Law, art. 28.

122. See *id.* art. 12.

123. Yong-Qing Fang et al., *National Policy Influence on Women's Careers in the People's Republic of China*, in *EMPLOYMENT OF WOMEN IN CHINESE CULTURES* 49, 55 (Granrose ed., 2005).

124. Brown, *supra* note 9, at 403.

125. Ogletree & de Silva-de Alwis, *supra* note 53, at 83.

126. Bulger, *supra* note 22, at 362.

127. Ogletree & de Silva-de Alwis, *supra* note 53, at 83.

and even a third hearing if a party is unhappy with the outcome.¹²⁸

Following the Beijing Conference in 1995, the Chinese government made unprecedented efforts to improve women's labor rights and curtail gender discrimination. For example, in 1995 China created the Program for the Development of Chinese Women, setting the year 2000 as the deadline to reach its goals.¹²⁹ This program focused on the advancement of current laws and the development of administrative sanctions for violations of these laws.¹³⁰ Also, as a result of the Beijing Conference, the Chinese government acknowledged the importance of women's participation in politics and prioritized the promotion and increased hiring of female cadres.¹³¹ At this time, the government created "unprecedented opportunities" for women at both the central and local levels of government.¹³² These changes, however, do not appear to have done exceedingly well, since in 2003 the Chinese Communist Party was only fourteen percent female, and at the rural level the Party was often all male.¹³³

In addition to national level reforms, the central government also responded to the Beijing Conference and international influence by encouraging local governments to pass legislation to advance women's interests.¹³⁴ Hebei Province, for example, conducted extensive surveys to determine women's involvement in various industries and managerial positions and drafted the Hebei Women's Development Program in 1995. This program proclaimed women's rights to life, education, and various economic rights, including employment, career advancement, and labor protection.¹³⁵ In 1995, statistics showed that women held only 0.2 percent of positions in high level management in Hebei Province, 0.01 percent of positions in government agencies, and 0.04 percent of positions in government institutions.¹³⁶ The Hebei Women's Development Program, based on the LPRIW, set goals for improvement: the first target year was in 2001, and then in 2001 it set its next goal at

128. *Id.* at 84.

129. Yong-Qing Fang, *supra* note 14, at 158.

130. HERSHATTER, *supra* note 2, at 7.

131. Yihong Jin, *Rural Women and Their Road to Public Participation*, in *HOLDING UP HALF THE SKY*, *supra* note 28, at 221, 230.

132. *Id.*

133. John Balzano, *Toward a Gay-Friendly China?: Legal Implications of Transition for Gays and Lesbians*, 16 *LAW & SEXUALITY REV.* 1, 16 (2007).

134. Local legislation in China can serve a positive purpose, but it is usually subordinate to national legislation. Conflict between work unit and local government regulations add to the confusion. See Bulger, *supra* note 22, at 349, 373.

135. Yong-Qing Fang, *supra* note 14, at 160-61.

136. *Id.* at 162.

2010.¹³⁷

In addition to the specific problems facing the early laws and regulations that defended women's labor rights (such as their unenforceability, their reinforcement of gender-based stereotypes, and their resulting disincentives to hire women) laws in China face a number of additional barriers. One such barrier is that women often do not attempt to use the law to defend their rights. This decision can be for a number of reasons. One reason women do not litigate is ignorance—women are often unaware of the existence of laws that may protect them, their rights under such laws, and how to obtain protection under them.¹³⁸ Also, women may have difficulty hiring a lawyer to represent them in labor disputes, either because of limited access to legal aid clinics or because attorneys screen their cases. Lawyers hesitate to take many labor cases because of their low fee potential,¹³⁹ and will screen cases involving female litigants who, for numerous reasons, they perceive to be “difficult” clients.¹⁴⁰ In addition, “strong social forces cause women to be too frightened or distrustful to come forward to vindicate [their] rights,” and women may chose not to litigate out of fear or a belief that litigation will only make matters worse.¹⁴¹

Even when an individual litigates an employment discrimination case and comes to a People's Court, she faces further problems at the judicial level. First, the judiciary in China is not fully independent, and judges are often hesitant to rule against a government that pays their salaries.¹⁴² Moreover, judges are often poorly trained, which may prevent them from properly implementing the law.¹⁴³ The problem presented by the poor training of judges is magnified because the Chinese system, which is a civil law system, does not use prior case precedents to interpret law. Furthermore, inexperienced judges face difficulty in maintaining consistent, predictable standards from court to court.¹⁴⁴ Some decisions are published in the *Gazette of the Supreme*

137. *Id.* at 160.

138. *Id.* at 162.

139. Ethan Michelson, *The Practice of Law as an Obstacle to Justice*, 40 LAW & SOC'Y REV. 1, 15 (2006).

140. See generally *id.* at 21-22 (describing common practices of stereotyping among lawyers by explaining that divorcees and individuals that express a great deal of emotion or moral outrage over the issues pertaining to their case are often perceived as “problem” clients).

141. Balzano, *supra* note 133, at 17.

142. Bulger, *supra* note 22, at 349; Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 30 (2006) (explaining that the practice of paying judges at the local level creates a widespread problem of “local protectionism”).

143. Lubman, *supra* note 142, at 29-30.

144. See Ogletree & de Silva-de Alwis, *supra* note 53, at 85 (discussing how the lack of binding case precedent makes it difficult for courts to arrive at uniform standards).

People's Court of the PRC, and these decisions are both formally and informally used as precedent by other judges;¹⁴⁵ however, the vast majority of decisions in China are unpublished and do not provide any guidance.¹⁴⁶ The Standing Committee of the National People's Congress holds the authority to interpret the Constitution,¹⁴⁷ and it does not provide the necessary detail required to assist untrained judges as they struggle with any conflicts that arise between local, provincial, and national laws, and the inevitable nuances and complications of employment discrimination cases. In addition, the drastic underrepresentation of women in the judiciary in China only compounds matters.¹⁴⁸

B. Socialist Harmonious Society

Most recently, the Chinese government has created a new goal for itself: achieving a harmonious socialist society.¹⁴⁹ The goal of making China a harmonious society was first advanced by Hu Jintao in a speech in 2005 in response to the many tensions that arose as a result of the economic reforms.¹⁵⁰ With the goal of harmonization, the Chinese government is pointedly turning its attention to the groups that were left behind during the reforms, hoping to harmonize the interests of disadvantaged groups with those who benefited from the economic boom. Women in China are clearly one of these disadvantaged groups, and while the government has not specifically acknowledged this fact,¹⁵¹ it did address the matter in 2008 by passing several laws that have a direct effect on women's labor rights and attempt to correct a number of the problems and limitations of prior legislation. Two of these laws can also be seen as a response to China's new responsibility under the ILO Convention against Employment and Labor Discrimination, which China ratified on December 1, 2006, to "take affirmative measures to end employment discrimination."¹⁵²

The Law of the PRC on Employment Contracts (Employment Contract Law), while not gender specific, does attempt to address some

145. Zhai Jianxiong, *Judicial Information of the People's Republic of China: A Survey*, Oct. 1, 2002, available at <http://www.lawinfochina.com/Article/Article3.html>.

146. Lubman, *supra* note 142, at 30.

147. XIAN FA, art. 67, § 1.

148. Lubman, *supra* note 142, at 84.

149. See generally Alice Miller, *Hu Jintao and the Sixth Plenum*, 20 CHINA LEADERSHIP MONITOR (2007), available at <http://media.hoover.org/documents/clm20am.pdf> (describing the Chinese Communist Party resolution of 2006 to build a "socialist harmonious society").

150. *Id.* at 5.

151. *Id.* at 4.

152. Xun Zeng, *supra* note 11, at 1014.

of the problems facing many female workers in China. Even after the passing of the LPRIW and the 1994 Labor Law, employers have continued to refuse to hire women or, more commonly, refuse to enter into a contract with them.¹⁵³ Even when they do create a contract, many employers simply ignore its terms.¹⁵⁴ The Employment Contract Law has caused a great deal of commotion among employers in China because it not only restates much of the 1994 Labor Law¹⁵⁵ (which has been largely ignored) but also adds additional sanctions for employers who do not create contracts with their employees, do not honor the terms of the contract, or impose excessive probationary periods, among numerous other provisions.¹⁵⁶ While the issues addressed are problems that are not particular to women, women in China frequently bear the brunt of unfair employment contract practices, and they will assuredly benefit from the enforcement of this law.

Another law passed in 2007 that directly affects women in China's workforce is the Employment Promotion Law. The goal of this law is to create fair employment conditions, stop employment discrimination, advance employment, and create social harmony in China.¹⁵⁷ The Employment Promotion Law is "considered more comprehensive than the 1994 Labor Law." It prohibits discrimination on numerous grounds, including gender, and places the obligation of avoiding discriminatory employment practices on the employer.¹⁵⁸ In addition, the law specifically states that employers may not include a clause in the employment contract that restricts female employees from getting married or bearing a child.¹⁵⁹

153. Zhiyong Wang, *Women in the Workplace: A Great Leap Backward*, China.org.cn, (March 22, 2004), available at <http://www.china.org.cn/english/2004/Mar/90950.htm>.

154. *Id.*

155. Labor Contract Law (adopted by the Standing Comm. Nat'l People's Cong., Jun. 29, 2007, effective Jan. 1, 2008) art. 42(4) (P.R.C.) ("An employer may not terminate an employment contract . . . if the worker . . . is a female employee in her pregnancy, confinement or nursing period.")

156. *See generally id.*

157. Law on Promotion of Employment (adopted by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) art. 1 (P.R.C.) [hereinafter LPE]; *New Employment Promotion Law in China*, 7 ASIAN HR ENEWSLETTER 12 (Dec. 3, 2007), available at <http://www.pacificbridge.com/asianews.asp?id=339> [hereinafter *New Employment*].

158. *New Employment*, *supra* note 157, at 12.

159. LPE, art. 27; Ogletree & de Silva-de Alwis, *supra* note 53, at 83 ("Women often need to seek the permission of the work units to become pregnant, and are sometimes made to promise that they will not get pregnant for a specified period of time."). *See generally* Bulger, *supra* note 22, at 345-47 (describing a case in which a woman pressed charges against an employer who fired her for getting pregnant with her first child without permission from the work unit).

While this law is a positive step toward preventing gender discrimination in the workplace, it has a number of flaws. Notably, while one clause of the law proclaims that “the state shall safeguard the equality of women with men in their enjoyment of labor rights,” which could be interpreted to protect women employees, the remaining articles of the Employment Promotion Law appear to protect only those women seeking employment.¹⁶⁰ Another drawback to this law is that, while it clearly states that it covers applicants, it leaves an exception that allows employers to discriminate in hiring for jobs that are “unsuitable for women.”¹⁶¹ The ILO criticized the draft of the law on these grounds, stating:

Following the ILO resolution of 1985 on equality of opportunity and treatment between men and women workers, specific measures of protection for women that are based on stereotyped thinking about their ability and their role in society have been called into question and may lead unnecessarily to breach of the principle of equality of opportunity and treatment. In this draft, although the phrases might be an expression of acknowledgment of the role women play in the modern Chinese labour market, the wording could be misinterpreted, and possibly lead to segregated job vacancies, training, guidance and job offers.¹⁶²

An important change, however, is that the new law specifies that the “unsuitable” position must be one that has been designated by the state.¹⁶³ This is an improvement that narrows the ability of employers to arbitrarily declare a position unsuitable for women.¹⁶⁴ However, it maintains the traditional and patriarchal idea that women are weaker than men and must be protected because they are incapable of determining for themselves which jobs they are capable of performing.

The third law passed in 2007 that has a substantial effect on women’s labor rights is the Law on Labor Dispute Mediation and

160. See, e.g., LPE, arts. 3, 27.

161. *Id.* art. 27.

162. Balzano, *supra* note 133, at 19.

163. *Id.*

164. See *Law Said to Protect Women from Prejudice*, CHINA DAILY, Oct. 11, 2007, available at <http://www.china.org.cn/english/government/227580.htm#> (“[T]he labor ministry also identifies several jobs that are unsuitable for women in an administrative regulation, which include working in mines, lumbering, the installation and removal of scaffolding and carrying material weighing more than 20 kg and over six times an hour.”).

Arbitration.¹⁶⁵ The first article of this law states that its goals are: “to resolve employment disputes in a fair and timely manner, protect the lawful rights and interests of the concerned parties[,] and promote harmonious and stable employment relationships.”¹⁶⁶ This law, which took effect in 2008, clarifies and loosens requirements for the mediation and arbitration of employment disputes, addressing many of the problems that limited effective dispute resolution under the Labor Law and the LPRIW. First, the Law on Mediation and Arbitration eliminates the filing fee for mediation and arbitration, alleviating some of the financial burden of litigation for employees.¹⁶⁷ For those wishing to arbitrate an employment dispute, the law clarifies and extends the statute of limitations to one year from the time the party “learnt or ought to have learnt that his/her/its rights were infringed” and allows for a suspension of this time limit for legitimate reasons.¹⁶⁸ The law allows an individual to challenge or report an arbitrator to the employment arbitration commission if the arbitrator is biased by bribes or relationship to the parties, and it provides penalties for the biased arbitrator.¹⁶⁹ In addition, the law deals with the time sensitivity issues that face individuals awaiting financial compensation in certain situations by providing that an award for advance execution may be granted and the case may be transferred to court for enforcement in these situations.¹⁷⁰ Finally, once the arbitrator has reached a decision, parties have only fifteen days to appeal it before a final decision is made.¹⁷¹ This is an improvement in that it no longer gives employers an indefinite amount of time to tie the matter up in court and place further strain on an employee's resources; however, it does not give an employee a great deal of time to find a lawyer and contest an unjust arbitration decision.

While it remains unclear whether these laws will, in practice, sufficiently address all of the problems they are meant to resolve, the new labor regulations have caused employers to modify their contracting and employment practices and have provided a means by

165. Law on Labor Dispute Mediation and Arbitration (adopted by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) arts. 34-44 (P.R.C.), *available at* http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471614.htm.

166. *Id.* art. 1.

167. *Id.*

168. *Id.* art. 27.

169. *Id.* arts. 33-34.

170. *Id.* art. 44. This provision came from previous administrative regulations.

171. *Id.* art. 48. Notably, there is an exception under Article 49 for an employer to petition the intermediate people's court within thirty days for vacation of the award in certain situations including mistake of law, jurisdiction, or fabricated evidence. It is not clear why this exception is only available to employers.

which employees have sued companies in violation of the law. While in the past fifteen years the government has passed administrative regulations, contract laws, and tort laws that may be used to protect workers, the most recent laws have created a furor of activity and debate among employers, workers, and lawyers in China. The new laws have sparked this activity because they eliminate means by which employers formerly could avoid contracting with employees, and they provide workers with the means to enforce their own rights using a variety of grievance mechanisms, without having to wait for another party to bring the suit on the worker's behalf.¹⁷² In the months leading up to the new laws' promulgation and in the two years since, attorneys have worked with companies to ensure their compliance with the laws, and both foreign and domestic Internet sites and blogs have dedicated numerous postings to analyzing the effects of the laws on business.¹⁷³ Workers acted on the law immediately. Within weeks of the promulgation of the Employment Contract Law, workers went on strike against a paper company that violated the law.¹⁷⁴ While it remains to be seen how effectively women will be able to use these laws to protect their employment rights, the laws demonstrate the Chinese government's continued commitment to creating enforceable employment rights, and they place a great deal of power in the hands of the individual employee to protect her own rights.

VI. RECOMMENDATIONS FOR OVERCOMING THE BARRIERS TO WORKPLACE GENDER EQUALITY

The problems of gender discrimination in the Chinese labor market run deep, and I do not presume that this Note can address all of the social, political, economic, and legal hindrances to women achieving equality in the workplace. The goal of this section is to address some of the deficiencies in the legal system that seem to be hurting women's abilities to be employed equally with men, and to point out a few ways in which these issues can be resolved.

There are a number of approaches to addressing the numerous individual and personal reasons preventing women from litigating when their rights have been violated, and some of these avenues are currently being pursued in China. One overarching way in which these problems

172. Jonathan Adams, *Chinese Union*, NEWSWEEK, Feb. 14, 2008, available at <http://www.newsweek.com/id/111027/page/1>.

173. See, e.g., *China's New Labor Law—Just Deal With It*, China Law Blog, June 4, 2008, available at http://www.chinalawblog.com/2008/06/chinas_new_labor_law_just_deal.html.

174. Adams, *supra* note 172.

may be addressed is to increase the number of women working at every level of the government. Achieving equality in government positions will not only help at a basic level by giving individual women jobs, but it will more broadly enable women to influence policy decisions at both the national and local level. This principle is already contained in the PRC Constitution, and it only needs to be implemented in some form of legislation, such as a law providing a quota system.

One area that the government has already recognized, but could improve in, is educating the public so that men and women alike are aware of women's rights to equal employment. This can be accomplished by publicizing laws at the national level. For example, the 2007 Employment Promotion Law, Contract Law, and Mediation and Arbitration Law were all publicized at the national and local level. The Ministry of Justice has recognized legal aid as an important part of a fair and just legal system, and legal aid centers have been established by local government organizations, universities, trade unions, and NGOs.¹⁷⁵ Many of these organizations are limited by financial difficulties and also may not provide legal services to migrant workers or individuals without residence permits.¹⁷⁶ Local governments in all parts of the country should establish and fund legal education centers, and efforts should be increased so that employers and employees alike are informed about legal rights and available sources of aid. Also, these organizations should continue to publicize stories of successfully resolved employment disputes so that individuals have real examples of the law leading to positive outcomes.

To address the cost of litigation, the Mediation and Arbitration Law has solved a portion of the problem by eliminating arbitration fees, but the issue remains. Free legal clinics sponsored by the government or by law schools (such as the Center for Women's Studies and Legal Services at Beijing University) can provide women with legal representation.¹⁷⁷ Increasing the number of free clinics and the quantity of cases these clinics can take on will open doors to women who otherwise would be

175. HO, *supra* note 108, at 155. See also Yong-Qing Fang, *supra* note 14, at 164 (describing the efforts made in Quanxi County, Hebei Province, where a legal desk was established at the local market, a common gathering place and high traffic area for local women, where they held training workshops and distributed materials that alerted women to their rights).

176. HO, *supra* note 108, at 156.

177. Benjamin L. Liebman, *Lawyers, Legal Aid, and Legitimacy in China*, in *RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA* 311, 317-19 (William P. Alford ed., 2007). These clinics have taken on numerous individual and class action discrimination cases, including those involving early retirement for women and back pay for female migrant workers. They are also known for being well connected: capable of gaining media attention and putting pressure on judges.

unable to pursue litigation when their rights are violated.

In addition to making it easier for women to pursue their labor cases in court, the Chinese government must also address the problems litigants face once they are in the courts, including the problems regarding the judiciary. These problems are wide-ranging and complex, but there are a number of solutions that will improve the way the courts handle gender discrimination cases. First, more female judges must be hired. Second, judges must be given more thorough training. Third, the government should issue regulations that are consistent nationwide, provide examples of laws' application, and clarify ambiguities in the Labor Law, the LPRIW, and the two new employment laws, so that judges have guidance on how to apply them.

Moreover, there is a great deal of progress that may be made by the Chinese government in the area of legislative reform for gender discrimination. For starters, the government should eliminate the use of stereotypes within current law, including state sanctioned discriminatory practices such as the earlier retirement age for women and the list of jobs that are considered unsuitable for women.¹⁷⁸ This also includes changing the way in which maternity leave and childcare are dealt with legally. If the government continues requiring individual employers to pay exorbitant amounts for maternity leave, health care, and childcare for female employees, it is unlikely that discrimination will ever be eliminated. Countries worldwide have dealt with this dilemma using a variety of solutions. From granting multiple years of paid maternity leave to new mothers, providing a parent's salary to mothers who stay home to care for children, subsidizing preschool education, or providing incentives for companies to hire working mothers half-time, governments have taken a number of approaches to which China may look in modifying its own maternity leave policies.¹⁷⁹ The least gender-biased approach is one that has been implemented in Sweden. This approach requires the mother and the father each to take time off of work in order to get the maximum amount of paid parental leave.¹⁸⁰ This practice does a great deal to change social perceptions of women as the sole domestic caretaker and realistically makes employers view both men and women as similar financial liabilities when it comes

178. See Labor Law; LPRIW; LPE.

179. *Female Power*, *supra* note 5, at 50-51. The United States, under the Family and Medical Leave Act of 1993, only requires employers to grant parents unpaid maternity. See 29 U.S.C. § 2601 (1993).

180. Jenny Ahlberg et al., *Actualizing the "Democratic Family"? Swedish Policy Rhetoric Versus Family Practices*, 15 SOC. POL.: INT'L STUD. IN GENDER, STATE & SOC'Y 79, 84-85 (2008).

to pregnancy.¹⁸¹

Finally, the government should focus on more specific, result-oriented legislation. An example of such legislation can be seen in Hebei Province, where the local government provides incentives to employers to rehire female employees by giving a bonus to employers who sign at least a one-year contract with a female worker who had been discharged.¹⁸² While this exact solution may not be the most practical to implement at the national level, an effort should be made to consider similarly creative solutions that would counteract the other factors currently discouraging employers from hiring women.

The stereotypes attached to women's capabilities and their role within society, which CEDAW requires countries to address in their legislation and programs, will be the most difficult to change. It is quite possible that, like in other countries, these stereotypes will never completely be eliminated in China; however, the government may still eliminate the most blatant stereotypes from its legislation. Using the law, the government has a great deal of influence over the way society perceives its various members, in addition to giving its members opportunities to change such perceptions themselves. Through the use of legal reform based on the premises that women are equally capable in the workplace, and that men are equally responsible for domestic obligations, the government and female leaders can gradually change China's perception of women, leading to greater equality in the workplace.

CONCLUSION

The global problem of gender-based employment discrimination is one that transcends borders, political systems, and cultures. Even in China, where the policies of Mao Zedong caused an international stir for their unparalleled effort to include women in the workforce, discrimination against women in China today is at least as prevalent as it is in Europe or the United States, if not more so.

While the goal of this note is not to propose a solution to the worldwide problem of discrimination against women, it can be used as a tool by which women from other cultures might better understand the issues involved. From China, it can be seen that the Cultural Revolution propaganda that called women to the workforce alleviated the

181. *But see, Female Power, supra* note 5, at 51 (pointing out that despite Sweden's gender-neutral maternity leave policies, "Only 1.5% of senior managers are women, compared with 11% in America. Three-quarters of Swedish women work in the public sector; three-quarters of men work in the private sector.").

182. Yong-Qing Fang, *supra* note 11, at 162.

perception that women do not belong in the workforce at all. Nevertheless, it did not eradicate the cultural preconceptions that women are less capable, and even less intelligent, than men. Because this was not the government's goal in encouraging increased female participation in the workforce, however, it is not surprising that once the policies were lifted and the concerns of capitalism alone dictated the labor market, gender-based employment discrimination emerged in greater force than when the market was controlled.

It is uncertain how much of the Chinese government's current efforts to prevent discrimination are due to domestic or international pressure. It is likely that many of the international treaties China ratified and much of the domestic legislation the government passed on behalf of gender equality were initially intended to secure the international community's goodwill.¹⁸³ But now that China has had its "coming out" party in the form of the 2008 Summer Olympics and has secured its international position on both an economic and political level, it has the freedom to assert its own agenda with increasing strength.¹⁸⁴ In the area of women's rights and gender discrimination in the workplace, it appears that China's current policy—achieving a "socialist harmonious society"—will benefit women.¹⁸⁵

What remains to be seen is how effectively the laws protecting women's labor rights will be enforced, and whether the Chinese government can move beyond deeply rooted stereotypes when enacting legislation. The fact that the Chinese government has not yet acknowledged the problematic nature of laws that reinforce traditional stereotypes of women's roles as mother and dutiful wife leads me to conclude that this will not be a goal until Chinese women themselves make it one.

183. In pursuing admission to the WTO in 2001, and securing the Olympic bid for 2008, China has shown an interest not only in economic reform, but also in obtaining status in the global community. In order to realize the kind of standing that China is seeking within the international community, China has been obliged to comply, to at least a certain extent, with international human rights ideals. *C.f.* Killion, *supra* note 92, at 212.

184. See generally RANDALL PEERENBOOM, *CHINA MODERNIZES: THREAT TO THE WEST OR MODEL TO THE REST?* (2007) (discussing ways in which China's view on foreign and domestic policy differs from that of the United States, and how China has been spreading its influence to developing countries). Notably, both the WTO and the Olympic Committee scrutinize potential countries' human rights records, and this was a significant area of contention for the Chinese Olympic bid.

185. Miller, *supra* note 149.